K

1944

File No. O/Railways/44

Legal Department

A **BRANCH**

Subject:—

Opinions under the Indian Railways Act, 1890

E
(-17)

O/Railways/44

File No.

Gen. 194 e.

51-A

C O N T E N T S

Legal Department File No. O.Railways/44.

Sr.No.	R.I./O.No.	Subject.	Pages.
		Opinions under the Indian Railways Act, 1890.	
1.	O.N. 135 8/1/44.	Section 135(2). Question whether the view expressed by Commissioner that after having made an award he became functus officios is correct. and if not, 2. Whether he can issue a fresh or sup lementary award Suo Motu of his own imtsure or on an application made by the Municipality in that behalf.	1-4.
2.	O.N. 1637 2-3-44.	Section 85, 86-- Re: Auction sale of unclaimed property in possession of B.P.T. Rly. under --- Question whether the control orders regulating selling price and coal can be applied generally to sale by public Auction and whether particularly to an auction sale governed by an Act of the controlor Provincial Government.	5-6.
3.	O.N. 2591 5-4-44.	1)Whether aggrieved person can, apart from the provisions of the Railwys Act, claim compensation from Rly. company under the common law for damage suffered by reason of inadequacy of the waterway of the Rly.bridge and 2)Whether the Rly .Co. is bound to carryout any work if a request is made by Provincial Government though the limit of 10 years since the construction has not passed.	7-12.

Contd..

1.	2.	3	4
4.	ON.3518 16-5-44.	Section 72(1). Re: Damage to the P.W.D. steam Roller by the Railway while it was being placed in the wagon for being carried to the deterioration. Question whether the P.W.D. can claim damages from B.B. & C.I.Rly.	13-16
5.	ON.4030 6-6-44.	Section 135(1). Cl.(V) Section 73 of the B'bay Municipal Boroughs Act, 1925. Section 3(1) Rly.(Local Authorities) Taxation)Act, 1941. Question whether good imported by the M.& S.M.Rly. for sale in the Indian Refreshment Room at Hubli are liable to pay octroi to the Hubli Municipkality.	17-20.
6.	ON 5254 25/8/44.	Sections 135(2). Question regarding payment of fair and reasonable amount by Rly. Administrtion to the Municixpality in lieu of the tax.	21-24.
7.	RLNW.7962 24-9-44. ON 7034 10-10-44.	Re: ----do----	25-26.
8.	ON-X8212 22-11-44.	Re: Eviction of Railway employees from Railway Quarters in Bombay. Section 138.	29-30.

JPE.12/7/56.5c.

PHB 3/8 NLG 3/1

Office of the R.L.A.

The Anand Municipality levies house tax and property tax on the properties of the Bombay Baroda and Central India Railway at Anand. In the year 1937-38, the Anand Municipality revised the house tax on thos properties and raised it from Rs.2180/- to Rs.4655/-. The B.B. & C.I. Railway Administration considered that the revised tax was too high and consequently it referred to matter to the Commissioner, N.D., the officer appointed under section 135(2) of the Indian Railways Act, 1890, for determining the sum payable by the railway administration in lieu of the tax. Afterhearing both the sides, the Commissioner made an award under his No. M.U.N.K./325 dated 26th February 1943, allowing 10 p.c. increase over the tax assessed by the Municipality in the year 1936-37 to which award the Railway Administration raised no objection. After making the award, the President of Anand Municipality pointed out some discre pancy in an amount of the tax of Rs-2140/- mentioned in the award and stated that the oorrect amount of the tax for the year 1936-37 should have been shown as Rs.2177-8-6. He, therefore, requests the Municipality should be allowed 10 p.c. increase on Rs.2177-8-6, The Commissioner states that in the information obtained from the Railway Engineer, it was found that the amount of tax on the Doctor's Bunglow bearing Mujicipal No. 192/1 valued at Rs.9000/- and assessef to tax at Rs. 33-12-0 in the year 1936-37, was omitted by mistake. This fact was brough to the notice of the General Manger, B.B. & C.I. Railway, who agreed to pay the tax on the said building on the gapital value of Rs.5000/- estimated by him and stated that the Railway Administration paid thetax of Rs. 33-12-0 on the said building under protest as it considered the tax to be High. After explaining thebasis of the Award, the Commissioner informed both the parties of his intention

to....

to make a supplementary award in the matter and asked each party to urge its objections, if any. The Anand Municipality agreed to the proposal of the Commissioner, but the General Manger, B.B. & C.I. Railway objected to payment of any additional lump sum in lieu of tax on Bungalow Nos192/1. On these facts the Commissioner's view is as follows:-

"Ater I made an award on 26th February 1943, I became functurs officio and I can correct the mistake in the calculation by making a supplementary only if both the parties consent to the same as my order is final. As stated above, the consent of one of the parties is wanting in this case. I therefore doubt whether I can make a supplementary award in the matter without the issue of a fresh order under section 135(2) of the Indian Railways Act either at any instance or on an application made in the matter by the Municipality."

The Commissioner wishes to know whther his view is correct. The G.D. office considers that there is nothing in section 135 of the Indian Railways Act,1890, which precludes the Commissioner from making a supplementary award in the circumstnces of the case, and that his argument that the award once given is final is open to doubt. The questions for R.L.A's consideration are :-

(1) Whether the view expressed by the Commissioner, H.D. that afterhaving made an award on 26th February 1943 under section 135(2) of the Indian Railways Act, he became functus officio, is correct; if not,

(2) Whether he can issue a fresh or supplementary award Suo Motu at his own instance or on an application made by the Municipality in that behalf.

2. Clause (2) of section 135 of the Indian Railways Act, 1890, provides that while a notification of the general controlling authority under clause (1) of this section is in force, the railway administration shall be liable to pay to the local authority either the tax mentioned in the notification or, in lieu thereof, such sum, if any, as an officer appointed in this behalf by the generaly controlling authority may, having regard to all the circumstnces of the case, from time to time

determine to be fair and reasonable. The Government of Indiax have by their ~~xxxx~~ Resolution in the P.W.D. No. 434 R.T. dated 17th August 1894 appointed the commissioners in charge of Divisions as the officers entitled, under section 135(2) of the Act, to determine the sum payable by the railway administration to local authorities in lieu of the taxes concerned. The words "from time to time" in section 135(2) mean "as occasion arises". The words "from time to time" are words which are constantly introduced where it is intended to protect a person who is empowered to act from the risk of having completely discharged his duty when he has once acted, and therefore, not being able to act again in the same direction. The meaning of the words "from time to time" is that after once acting, the donee of the power may act again- and either independently or by adding to, or taking from, or reversing altogether his previous Act" (p. 781 of Stround's Judicial Dictionery). The words "from time to time" occurring in section 135(2) imply that after having once acted and made an award, the Commissioner does not become functus officio, but that he can again exercise the power vested in him if an occasion asises. The application made by the Anand Municiplity affords a reasonable and sufficient ground for the Commissioner to act again and revise his previous award and apart from the fact that the B.B. & C.I. Railway Administration is a consenting party or not to a supplementary award, the Commissioner can, under section 135(2) of the Indian Railways Act, 1890, modify his award or make a fresh award after following the same procedure that he followed at the time of making his award dated 26th February 1943. The view of the Commissioner does not appear to be correct.

Id/- P.N.M.
6/1/44
Remembrancer of Legal Affairs.

U.R. to G.D.P., No.135, dated the 8th January 1944.

JPE.11/7/56.4c.

Office of the R.L.A.

Some unclaimed wagons of coal and coal ash were lying in the possession of the Bombay Port Trust Railway. The Railway auctioned the goods under sections 55 and 56 of the Indian Railways Act, 1890. Among the goods sold was one wagon of steam coal. The controlled price was Rs-39-8-0 per ton. But this coal was sold at Rs.45 per ton to the highest bidder. The Provincial Coal Controller raises the general question firstly whether the control orders regulating the selling price of coal can be applied generally to sale by public auction and secondly whether particularly to an auction sale governed by an Act of the Central or Provincial Government,

2. The relevant notification is F.D.(Supply) No. 382 dated 27-3-43 as modified by notification No.38(2)-IV dated 4-6-43. The notification provides that steam coal shall not be sold at any place in the Province of Bombay at a price higher than the maximum price specified therein viz., Rs.39-8-0 per ton ex-depot of the seller. The notification does not regulate the method of sale. It merely provides that a price shall not exceed a certain figure. An auction is a manner of selling by bids and usually to the highest bidder by public competition. Generally the notification would apply to auctions. A coal merchant could not escape his obligations under the notification merely by selling his goods by auction. That is sufficient to dispose of the main question which has been referred, but there remains the question of auction by statutory provision. It seems inadvisable to pronounce generally on that further question. Particular provisions of the statute concerned might decide the question in a particular fashion. The present reference arose from a case

of..

of statutory sale by auction under sections 55 and 56 of the Railways Act, 1890. The question whether this example is governed by the control order or not is doubtful. The seller was a public body exercising statutory powers. It may not have been compulsory for the Railway to sell the coal; for section 55 of the Railways Act allows the railway to recover its dues by suit. But the remedy of a civil suit is long and troublesome and a railway would be most reluctant to surrender its speedier remedy under section55. Once the Railway decided to sell the coal it had to do so by auction. If the highest bid at the auction had been below the controlle price then clearly no objection could have been taken to the sale. But here the bidders were ready to go beyond the controlled price. In such circumstnance the Railway could not hav fixed the maximum bid at the controlled price because the auction sale would have ceased to have been an auction. It is clear that there is not here a case of profiteering, but merely the exercise of a statutory right to sell goods by auction. If the dues were less than the sale price the benefit of the excess price would go not to the Railway but to the owner. The words in the notification "per ton ex-depot of t e seller" suggest sale in the ordinary course of business and not sale under a statute like the Railways Act. The matter is not free from doubt, but I think on the whole, that the notification would not apply to auction sales under sections 55 and 56 of the Railways Act.

Id/- P.N.M.
2/3/44.

Remembrancer of Legal Affairs.

U.R. to F.D.(Supply), No.1637,
dated the 2nd March 1944.

JPE.11/7/56.
4 copies.

Office of the R.L.A.

The B.B. & C:I. Rly. while constructing a railway line in 1871 built near Malkanan in Baroda State a bridge between Mehmedabad and Nadiad. The bridge provides passage for the Malkana nala. In 1927 the bridge was swept away by floods and in 1928 a new bridge was built. There were several difference in the stnucture of the two bridges. Some of t e differences in the new bridge tended to decrease the waterway while others tended to increase it. From the facts stated in the present papers, it is clear that it has not been substantiated that the second bridge reduced the water way. See for example the following statement from the Superintending Engineer, N.C.S: letter at p. 84: "The bridge was subsequently rebuilt by the Railway Company in 1928 as per accompnaying blue print, from a perusal of which it will be clear that the bridge has if anything slightly more water way now than in 1927" However the nala flooded once in 1933, and thrice in 1941 and the damage is estimated at one place in the papers at Rs.2,55,000. The occupants of the lands concerned allege that t e damage was caused by the narrowness of the new railway bridge. Thereis nothing in the papers to show whetherthere was any damage from floods before 1928. Apparently no such damage was brought to the notice of Government. The P.W.D. seems to be convinced that damage from the floods would be reduced if the railway bridge were widened or improved. The two questions referred to the R.L.A. are (1) whether the aggrieved persons can, apart from the provisions of the Indian Railways Act, claim compensation from the Railway Company under the common law for damages suffered by them by reason of the inadequacy of the waterway of the railway bridge and (2) whether the Railway Company is should to carry out any

work.....

work if a request is made by Provincial Government though the limit of 10 years since the construction of the bridge has passed.

2. On the first point of the Privy Council decision in the Gaekawar of Baroda v. Katcharabhai Kasturchand (5 B.L.R. 405) is clear authority. Lord MacNaghten there said: It has been determine over and over again that if a person or a body of persons having statutory authority for the construction of works.....exceed or abuse the powers conferred by the Legislature, the remedy of a person injured in consequence is by action or suit and not by a proceeding for compensation under the stantute which has been so transgressed. Powers of this sort are to be exercised with ordinary care and skill and with some regard to the property and rights of others." In that case the railway was constructed on an embankment and the embankment "was designed with so littel skill that no proper provision was made for the passage of the surface water. The greater part of it being obstructed by the embankment flowed down by the east side of the line and drowned the Respondent's land." Therefore, if the persons affected could prove that the Railway Company had exceeded or abused its powers under the Railway Act they would have a remedy at law, apart from any remedy provided by the Railway Act. But in this case, it would be difficult for the persons concerned to prove at this late stage that the Company had abused or exceeded its powers. Under section 11 ofthe Indian Railways Act, a railway company has to make and maintain all necessary arches, tunnels, culverts, drains, watercourses or other passages of such dimensions as will, in the opinion of the Provincial Government, be sufficient at all times to convery water as freely from or to the lands lying near or affected by the railway as before the making of the railway or as before the making of the railways or as nearly so as may be. There is nothing to show that when the Railway . JPE.11/7-4c

There is nothing to show that when the Railway..

Railway Compnay first built the bridge in 1871 any objection was tken that the bridge was insufficient or that flooding took place. Further, the papers do not show that the second brdige build in 1928 provided a lesser waterway than the first waterway. It is clear that in abnormal years floods do take place. But that does not show that the present bridge does not convey the water as freely from the lands as beforethe making of the railway in 1871, Further it is to be remembered that "the accommodation works which the Company may be required to make under the Act are such accomodation works as are required at the time the land is taken, having regard to its then use, and not accommodation works which may be required when the character of the land and perhaps the nature of the neighbourhood is entirely altered years afterwards." (per Lindley C.J. in Rhondda and Swansea Railway v. Talbot (1897) 2. Ch. 131 C.A.) Briefly, then, the position is that the persons aggrieved have a remedy if they can prove that the Company exceeded or abused its powers under the Railway Act, In the present case, there seem to be insuperable difficulties in the way of proving such excess or abuse.

3. The next question is whether the Provincial Government can at this stage require the Railway Cpmpany to make further accommodation by way of a new of an improved bridge. Section 11 mainly provides firstly forthe making of works of accommodation during or immediately after the laying out or formation of the railway over the lands and secondly for the maintenance thereafter without any limit of time. Such works are afor the accommodation of owners and occupiers of lands adjoining the railway. Section 12 provides that if an owner occupier of any land affected by a railway considers

the...

the works made under section 11 to be insufficient for the commdious use of the land or if the Provincial Government or a local authority desires to construct a public road or other work across, under or over a railway, he or it may, at any time, require therail-way administration to make at this or its expense such further accommodation works as he or it thinks necessary and are agreed to by the railway administration or as, in the case of difference of opinion, may be authorised by the General controlling authority. In the present case section 12 would seem to have no application for it is not the intention of Government that the work should be carried out at Government expense". The contemplated work is not "otherworks" within the meaning of the section. Sections 11 and 12 are the main provisions for works of accommodation. Section 11 provides for the original constructions of such works at the time or immediately afterthe railway is built. As regards the Provincial Government, it cannot so far as section 12 is concerned, require every kind of accommodation work to be constructed but only a public road or other work across, under or over a a railway. It is the Provincial Government which must pay for such construction under section 12. But then proviso (3)(b) to section 11 provides that a railway administration shall not, except on the requisition of the Provincial Government, be compelled to defray the cost of executing any further or additional accommodation works for the use of the owners or occupiers of the lands after the expiration of 10 years. That proviso does not deal directly with the compulsion upon a railway administration to construct works but with the compulsion upon the administration to defray the cost of additional or further accommodation works. It limits the laibility of the railway administration to defray the cost of further accommodation works.

The....

The curious points in that there is no clear provision of the Act to the effect that the railway administration shall defray such costs. Therefore it is not clear why there is any need for a proviso to limit that liability. Nor it there any clear ~~xxxx~~provision in the Act that the Provincial Government shall have power to make a requisition for further accommodation works for the benefit of the land adjoining and to compel the railway administration to defray the cost. Such provisionx has to be spelt out from thw words of the proviso "except on the requisition of the Provincial Government". That seems an odd way of conferring such a power upon the Provincial Government. Apparently the power to make a requisition is without time limit and there is no indication to what circumstances such power of requisition is to be restricted. The R.L.A. in his opinion No.2629 dated 18-5-47 held that 'although more than 10 years have expired since the construction of the Rly. under provision(b) to sub-section 3) of section 11,it would be open to the Provincial Government to make a requisition to the Rly. requiring them to construct a ~~x~~level crossing at point 'D' in the plan". That opinion was followed in R.L.A.'s opinion No.8329 dated 15-11-1938. The Agent of the B.B. & C.I.Rly, in his letter dated 4th May 1938 at p. 207 of the file No. 1096/36-I P.W.D., admitted "that in cases to which the proviso applies, the railway administration can be compelled to defray the costs of executing further or additional accommodation works, even after the expiration of 10 years from the date of opening of the railway, if the Provincial Government makes a requisition to that effect." It may be accepted, then, that the Provincial Government can make the requisition beforeor after the period of 10 years. But is Government's power to make the requisition unrestricted? The Agent in the above letter tried

tried to restrict Governmentôs power to certain circumstances : (a) there must be an original accommodation xwork and (b) the original accommodation work must be insuffficient. I do not know of any case in India where any restrictions to Government's power of requisition have been stated. The Indian Railways Act itself is not at all explicit on the point. In the English Railwgys Act there is no correspondming provision. In England after 5 years, or such period as is prescribed, the Company cannot be compelled to make any further additional Aaccommodation works. After the expiry of that period nox one, not even Government, can compel the railway. See section 73 of the Railways Clauses Consolidation Act, 1845. (14 Halsbury's Statutes, page 59). In those circumstances one cannot [illegible] pronounce definitely on the extent of the Pronvincial Government's power under Proviso 3(b) to Section 11.

4. In the present case about 75 years have elapsed since the building of the Railway. So afr as the present papers show it has bet been established that the original accommodation works were insufficiant of that the Railway Company abused or exceeded its powers. Neither has it been established that the seconfd railway bridge provided less water way than the first. In these circumstances the Railway is likely to resist Government's requisitionand it is impossiblo to predict what would be the outcome if the matter went to Court. P.W.D.may, if it thinks fit, negotiate with the Railway but it should be recognised that Govt. is not on firm ground.

Sd/- P.N.Moos 5/4/44.
Remembrancer of Legal Affairs.

U.R. to P.W.D.,NO.2591, dated the 5th April 1944.

JPE.11/7/56.4c.

Office of the R.L.A.

A ten-ton Steam Road Roller was delivered by the [illegible]P.W.D. on 27-10-1942 to the Railway Authorities at Bahejadi Railway Station (B.B. & C.I. Rly.) for booking to Kalyan(G.I.P.Rly). The P.W.D. alleges that while the Railway authorities were lifting the steam rooler by means of a crane to place it into a railway wagon, it was damaged, the fork of the roller being cracked. The P.W.D. calaims damages from the Railway for causing damgage to the steam roller. The Railway authorities contend that (i) the steam roller was not in goood condition when tandered for despatch; that (ii) under conditions [illegible] notified the Goods Tariff Rules it is the sender who is responsible for loading heavy consignment and that (iii) the sender having executed a risk note in Form 'A' he undertook to hold the Railway Administration free and harmless from all responsibility for damage. The question for the consideration of the R.L.A. is whether the [illegible]P.W.D. is entitled to claim damages from the B.B. & C.I. Rly. for the damage caused to the steam rolle.

2. Sub-section (1) of section 72 of the Indian Railways Act, 1890, provides that the responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by railway shall subject to the otner provisions of this Act be that of a bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872. Sub-section (2) lays down that....

that an agreement purporting to limit that responsibility shall, in so far as it purpoxrts to effect such limitation b e void unless it -

(a) is in writing signed by or on behalf of the person sending or delivering to the railway administration the animals or goods, and

(b) is otherwise in a form approved by the Federal Raiwlay authority.

In is clenr from these provisions that the liability of the Railwyy Administration under that section will arise only when damage is caused tom goods after delivery and that the Railway Administration may enter into an agreement to limit its responsibility provided it is in a form approved by the Governor General in Council. Consequently the questions relevant for consideration are -

(1) whether the steam roller was damaged before delivery; and

(2) whether there was any agreement absmlving the Railway Administration from responsibility for the damage done to the steam roller.

2. The question as to when certain goods will be deemed to have been delivered in a particular case to the raiwlway company is really a question of fact to be decided with reference to special cirucmstances of each case. And where it is shown down that the consignner has done all that is possible for him to put the goods in the possession of the Railway Company and that there is nothing left for him to be done in that connection and that there is clear evidence direct or circumstantail that the Railway Company has accepted the custody of the goods the liability of the Railway Company as a bailee will begin to operate". (Hari Rao's Indian Railways Act, p. 361). Exception (b)(ii) to rule 22 of the General Rules of theGoods Tariff issued by the B.B. I C.I. Rly. provide sthat heavy machinery,long timber or other heavy articles weighing one ton and over per piece are required to be loaded and unloaded by the senders

and.....

and consignees respectively. Exception to rule 24(a) provides that when a consignment is of such a size and weightx as to make it necessary to use crane power to load or unload it, the owners havex the option of arranging for loading and unloading it themselves, but if a railway crane is used the charges forthe same will have to be paid. Under rule 27 in all cases where the owners of goods are required to do the loading and unlodding as the case may be, the risks attending these operations shall be borne by the owners. These rules are deemed to be accepted by th se who would like to transfport their goods by the B.B. & C.I. Rly. Consequently these r les are binding on the P.W.D. It seems that there was no delivery of the steam roller to the B.B. & C.I. Rly in the present casex untile it was loaded in the wagon: xxxxxxxxxxxxxxxxxxxxxx and the steam roller being damaged before delivery the B.B. & C.I.Rly would not be liable under section 72 to pay compensation for the damage caused to it while being loaded. Nor would the Railway be liable under the risk notes.

3. It is clear that the roller was damaged while loading by crane. But there is nothing at all to show in what manner, if any, thecranemen were negligent. Unless the P.W.D. can obtain good evidence to show in what manner the roller was negligently loaded, it is necessary to considerx whether the accident was a risk of loading form which the Railway could properly claim to be absolved from responsibility.

Sd/- P.N.Moes. 15/5/44.
Remembrancer of Legal Affairs.

U.R. to P.W.D., No.3518, dated the 16th May 1944.

The facts as disclosed in the letter from the Administrator Hubli Borough Municipality, No. Octroi, S.R. 74, dated 25/28 January 1944 are these :-

2. The First and Second Class Refreshment Rooms conducted on European style at Hublix Railway Station are run by Messrs. Spencer & Co Ltd., as contractors. They purchase their own stock and appropriate the profits arising out of concern, TheIndian Refreshment Room, however, is conducted and managed by the M. & S. M.Railway, the Manager of which is a railwxy servant. The Administrator, Hublic Borough Municipality, contends that though the Management of the Indian Refreshment Room is conducted by the Railway, the goods imported at the said Refreshment Room are really meant for the consumption of the passengers and not for the bona fide use of the Railway itself, since the Railway derives profits out khof the sale of such goods it is liable to pay octroi on the goods imported for the purpose of the Indian Refreshment Room.

3. It seems that the Hubli Borough Municipality used to levy terminal tax under clause (v) of section 73 of the Bombay Municipal Boroughs Act, 1925, on goods imported within the Municipal limits. Till 1939-40 the terminal tax was not recovered on the goods imported by the said Refreshment Room. In the Audit Note on the account of the Hubli Municipality for the year 1938-1939 the accountxxfxthexHxblixMunicipalityxxfarxthe xaxxExaminer, Local Fund Accounts, raised objectio to the goods imported by the said Refreshment

Room....

Room being exempted from payment of terminal tax and directed that 'in the absence of specific authority exempting these imports, the rexcovery of the tax should be enforced. "As a result, the Chief Officer xxix called upon Messrs. Spencer & Co., Ltd., and the Chief Commerxcial Manager, M. & S.M.Railway, to pay the terminal tax on the goods imported by them. After some correspondence with the Chief Officer, the Chief Commerical Manager, M. && S.M.Railway, on 28th September 1940,issued instructions to the Room Manager of the Indian Refreshment Room, Hubli, for payment of the terminal tax in respect of the supplies with effect fr m 1st April 1940. Presumably the tax was paid by the Indian Refreshment Room in pursuance of the directions from the Chief Commercial Manager. In the year 1942 the proposal of the Administrator, Hubli Borough Municipality, for the substitution of octroi for the terminal tax was sanctioned by Government (vide G.R., R.D.No. S.91 (103), dated 19th October 1942) and the Hubli Borough Municipality began to levy octroi duty under section 73(iv) of the Bombay Municipal Boroughs Act, 1925, on goods brough within the octroi limits for consumption or xuse therein. The HHubli Mantcipal Borough made a demand on the M. & S.M.Railway for payment of octroi duty in respect of goods imported for the Indian Refreshment Room at Hubli with effect from 1st April 1943, which demand has now been objected to by the Agent and General Manager, M. & S.M.Railway.

4. The question referred for the R.L.A.'s consideration is whether goods imported by the M.X.&. S.M. Railway for sale fn the Indian Ref reshment Room at Hublic afe liable to pay thxxxxxxi octroi duty to the Hbbli Municipality The M. & S.M. Railway contend that the liability to pay the octroi duty can only arise under section 135(1)

of.....

of the Indian Railways Act, 1890 or section 3(1) of the Railway (Local Authorities Taxation) Act, 1941-Since there is no notification regarding octroi duty under those sections Railway is not at all liable. Section 135(1) of the Indian Railwys Act, 1890, provides that 'notwithstanding anything to the contrary in any enactment or in any agreement or award base d on any enactment, the following rules shall regulate the levy of taxes in respect of railways and from railway administration ins aid ofthe funds of local authorities, namely:-

(1) A railway administration shall not be liable to pay any tax in aid of the funds of any local authority unless the (general controllir authority has, by notification in the Official Gazette, declare the railway administration to be liable to pay the tax." Notifications under that sub-section are not repealed by the passing of the Railway (Local Authorities Taxation) Act, 1941. Notificationshavem been issued under section 135 of the 1890 Act declaring the liability of the M. & S.M. Railway in respect of Municipal taxation.The latest notification which my office can trace is No. 230 Railway Department, dated 23fd August 1911(Gazette of India, August 26, 1911 Part I page 700). Therein it is declared that the Hubli Municipality is entitled to levy only house tax on the railway. Perhaps further inquiries might be made as to whetherthere is any later notification. It is not clear under that authority the Hubli Municipality levied the terminal tax on the railway. So far as the above notification is concerned, theMunicipality would not be entitled

to....

to levy octroi duty.

5. The Administrator's argument, however, is that the property in question is not property of a railway within the meaning of that term in section 3(1) of the 1941 Act. In the first place, this argument would not have been open to the Municiplaity under the 1890 Act. Section 135(1) of 1890 Act does not mention property but merely provides that the railway administration shall not be liable to pay an y tax unless there is a notification. It does not seem likely that the 1941 Act was intended to introduce the distinction now pleaded for by the Administrator, "Property of a railway" has not been defined in either of the Acts. 'Railway' has been defined in section 3 of the 1890 Act, but that definition is inclusive and does not determine the meaning of the present term. I think a court would be very loath to limit "property of a railway" in the manner proposed by the Administrator. In my view it does include stores meant for the Indian Refreshment Room and it is for the Central Government to decide whether or not they shall notify the stores as liable for octroi duty. If the Municipality therefore insists on the levy of this duty, the proper course would be to approach the Central Government.

Id/- P.N.M.
5/6/44.

Remembrancer of Legal Affairs.

U.R. to G.D., No. 4030,

dated the 6th June1944.

JPE.12/7/56.
4 copies.

Office of the R.L.A.

By virtue of powers vested under section135(2) of the Indian Railways Act, 1890 the Governor General in Council appointed in 1894 the Commissioners of the Divisions as officers to determine a fair and reasonable amount which a railway administration should, in lieu of the tax, pay the legal authority (see Government Resolution No.3753 dated 6th October 1894 reprinting the Government of Indian (P.W.D.) Resolution No.434, R.T.,dated 17th August 1894). It appears that in pursuance thereof the General Manager, B?B.& C. Railway made an application to the Commissioner, N.D. for fixing a lump sum in lieu of taxes levied by theUmereth Municipality and it has now readhed the stage of hearing the parties. There are also two applications pending before the Commissioner from the Railway Administration for making supplementary awards in modification of the awards already declared. In themean time the Government of Indian has, by virtue of powers vested under section 135(2) of the Indian Railways Act, 1890 and section 3(2) of the Railwaxys (Local) Authorities Taxation) Act, 1941, appointed the District Judge of the District to determine when occasion arises the lump sum in lieu of thetax payable to a local authority outside theCity of Bombay (See Railway Department (Railway Board) Notification No. F.42/TX.17/(16), dated 11th January 1944.) The Commissioner, N.D. considers that he has no longer any jurisdiction and proposes that the parties should lodge fresh applicaxtions to the proper authority i.e. the District Judge concerned. The question for the consideration of the R.L.A. is whether the Commissioner, N.D. has by reasonx of the aforesaid Government of India Notification dated 11th January 1944 been divested of jurisdiction.

2.The Railways (Local Authorities Taxation) Act. 1941, provides for gegulating the extent to which property vested in His Majesty for the purposes of the Central Government being the property of a railway shall be liable to taxation imposed by an authority

within....

within the Province. Under section 4 the Central Government is empowered to cancel or modify the existing liability of a railway administration to taxation whereas section 3 (1) has empowered Government to consent by a notification to the levy of a fresh tax by a local authority on the railway property vesting in His Majesty for the purposesm of the Central Government. Sub-section (2) of section 3 provides : "While a notification under sub-section (1) is in force the railway administration shall be liable to pay to thelocal authority m either the tax mentioned in the notification or in lieu thereof, such sum, if any, as a person appointed in this behalf by the Central Government may having regard to services rendered to the railway and all the relevant circumstances of the case, from time to time determine to be fair and reasonable. The person so appointed shall be a person who is or has been a judge of a High Court or A District Judge". Reading these provisions together it appears that a person appoint under sub-section (2) of section 3 will have jurisdiction to determine a lump sum in lieu of the tax payable only in cases where a new tax hasx been levied by a notification issued under sub-section (1) and that the person appointed under section 135(2) of the Indian Railways Act, 1890 will continue to exercise jurisdiction in cases where the tax levied was being levied proper to 1st April 1937 irrespective of the question whether the railway property which has been subjected to such levy is or is not the property vesting in His Majesty for the purposes of the Central Government.It was presumable for this reason that the Railway Department Notification No. F 42/TX.17/(16), dated 11th January 1944, has been issued both under section 135(2) of the Indian Railways (Local Authorities Taxation) Act, 1941 so that the power to determine a lump sum in lieu of a tax levied either

before.....

JPE.12/7/56.
4 copies.

before or after 1st April 1935 should vest in one and the same person.

3. There is however no reference in the Railway Department Notification No.F.42/TX.17/(16), dated 11th January 1944 to the modification or cancellation of theGovernment of India Resolution No.434 R.T. dated 17th August 1894 under clause (2) of section 135 of the Indian Railways Act. The question therefore arises whether previous orders of appointment still subsist or whether they are repealed by this later notification. On the whole I think they must be presumed tohave been repealed and itx is only the District Judge who now has powers of dtermining the amount of tax payable. If that is so the further question arises whether the fact that the applications to the Commissioner were made before the issue of this notification, empowers the Commissioner to decide these pending applications. No doubt the application were properly made to the Commissioner but the essence of the power given to the person appointed under section 135(2) is the power to determine taxation not to receive applications. By virtue of the Railway Department Notification of 1944 the Commissioner has no longerthe power to determine the amount of tax payable and in my opinion his inability extends to pending cases. The two points however are not free from dbout and it would be advisable to have the above confirmed by the Railway Department which issued the Notificatinn.

Whether the Commissioner, if he is unable to dispose of the applications, should return the papers to the parties concerned or transfer them to the District Judge is a minor point which the Commissioner may settle in consultation with the parties.

Sd/- P.N.M.
22/7/44.

Remembrancer of Legal Affairs.

U.R. to G.D.,No.5254,

dated the 25th July 1944.

JPE.12/7/56.4c.

L.D.R.I.No.7962
18-9-44-

Submitted.

2. Please See R.L.A.'s opinion No. 5254, dated the 25th July xxxxxx1944, the notes underlying it and also the G.D. note at p.16 ante.

3. On G.D.'s request to confirm the points in paras.2 and 3 of the R.L.A's opinion referred to above, the Secretary, Railwa y Board, New Delhi observes in his letter at p. 15 ante that the object underlying the issue of the Notification No. F 42/TX 17/16 dated 11-1-1944 was to set a uniform procedure for the determination of a lump sum in lieu of the tax both under section 135(2) of the Indian Railways Act, 1890, and section 3(2) of the Railways (Local Authorities Taxation) Act, 1941, and that the statement in para 2 of the R.L.A.'s above mentioned opinion that there is no reference xxin the Notification No. F 42/TX 17/16 dated 11-1-1944 regarding modification or cancellation of the Govt. of India Resolution No. 434 RT dated 17-8-1894 is not quite correct and refers in this connection to the Railway Boards Resolution No. F42/TX 17/16 dated 11-1-1944 which contains thenecessary amendments to the former resolution of 1894.

As regards the question whether or not a Commissioner of a Division candispose f a case already referred to him before the issue of the Notification dated 11-1-1944 the Legislative Department of the Government of India has advised the Railway Board that on the analogy of the concluding words of section 6 of the General Clauses Act, 1897, there would be no objection to a Commissioner of a Division Disposing of a case which might have been referred

to....

him beforell-1-1944(the date of the issue of the Notification) and that cases occurring after that date ~~afxkkmshould~~ be referred to a District or High Court Judge.

4. The papers are shown to R. L. A. ~~wikth~~ reference to R. L. A.'~~s~~ opinion No. 5254 dated the 25th July 1944 referred to above, wherein the ~~kkaR~~.L.A. had observed that it would be advisable to have the points discussed t~~h~~erein confirmed by the Railway Department, which issued the Notification. No further action appears necessary now; the papers may therefore be seen and returned. A copy of the letter ~~on~~ p. 15 ante from the Secretary Railway Board, New Delhi may be kept on this ~~office~~x records.

Sd/- S.A.V.
23/9

S.A.~~S~~. Id/- R.T.K.
25/9

A.L.R. Id/- R.S.H.
26/9

R.L.A. The legal position at A of the Secretary Railway Board is not free from doubt. However no action appears necessary.

Sd/- P.N.Moos
3/10/44

U.R. to G.D. No.7034,
dated the 10~~2~~ October 1944.

JPE.12/7/56.4c.

No. 8212

Office of the
Remembrancer of Legal Affairs,
Bombay Castle, 22nd November1944.

From

P.N.Moos, Esquire, Bar-at-Law, I.C.S.,
Remembrancer of Legal Affairs.

To

The General Manager,
G.I.P.Railway,
Victoria,
Bombay.

Re: Eviction of Railway employees from Railway quarters in Bombay.

Sir,

With referenc to your letter No.22195-V/118, dated the 14th November 1944, on the subject noted above, I have the honour to send herewith my opinion in the matter.

Your bbedient servant,

Id/- P.N.M
22/11/44

Remembrancer of Legal Affairs.

JBE.12/7/56.
4 copies.

Office of the R.L.A.

The view taken by the Chief Presidency Magistrate appears to be correct. Under section 138 of the Indian Railways Act, 1890, it is only a Magistrate of the First Class who can, on an application by the Railway Administration, order the removal of a discharged railway servant from a railway building and deliver possession of the same to the Railway Administration. Under the Code of Criminal Procedure, 1898, a Presidency Magistrate is a distinct entity from a Magistrate as such and this appears to be a causus omissus. Therebeing no Magistrate of the First Class in Bombay, it is not legally feasible for the Railway Administration to resort to section 138 of the Indian Railways Act for securing possession of railway property in Bombay unless the section is suitably amended. It is however possible for the Railway Administration to achieve its object by resorting to section 41 of the Presidency Small Causes Court Act, 1882, which provides an equally speedy remedy for regaining possession of railway property in Bombay.

Sd/- P.N.Moos
22/11/44.

Remembrancer of Legal Affairs.

JPS.12/7/56.
4 copies.